

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARIO JAMAL CLARK,

Defendant-Appellant.

UNPUBLISHED

May 25, 2010

No. 289283

Wayne Circuit Court

LC No. 06-013035

Before: MURPHY, C.J., and K.F. KELLY and STEPHENS, JJ.

PER CURIAM.

After revoking defendant's probation because he used marijuana, the trial court sentenced defendant to a prison term of 19 months to 10 years on his plea-based conviction of larceny from a person, MCL 750.357. This Court denied defendant's application for leave to appeal. *People v Clark*, unpublished order of the Court of Appeals, entered January 15, 2009 (Docket No. 289283). However, our Supreme Court, in lieu of granting leave to appeal, has remanded the case to us "for consideration, as on leave granted, of the issues raised in the defendant's application to this Court, including the due process issue left open by *People v Breeding*, 284 Mich App 471; 772 NW2d 810 (2009)[.]" *People v Clark*, ___ Mich ___; 773 NW2d 669 (2009). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that his constitutional right of confrontation was violated when hearsay testimony concerning his marijuana use was admitted at the probation violation hearing. Initially, we disagree with defendant's claim that he preserved this issue with an appropriate objection at the probation violation hearing. At one point in the proceeding, defendant objected to testimony on the basis that the sole witness called to take the stand lacked personal knowledge. He did not object on the constitutional ground that he now raises on appeal. "An objection based on one ground is usually considered insufficient to preserve an appellate attack based on a different ground." *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Moreover, the objection that was raised did not pertain to testimony regarding marijuana use, and defendant did not object to any of the testimony that he challenges on appeal. Therefore, this issue is unpreserved. This Court reviews unpreserved claims of constitutional violations for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The requirement that a defendant establish the existence of a plain error that affected his or her substantial rights entails a showing that the defendant was prejudiced, i.e., "that the error affected the outcome of the lower court proceedings." *Id.* at 763. Finally, even

after a defendant establishes a plain error and prejudice, reversal is only warranted when the forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence. *Id.*

The rules of evidence, except those pertaining to privileges, do not apply at a probation revocation hearing. MCR 6.445(E)(1). Although the Sixth Amendment right of confrontation prohibits the introduction of out-of-court testimonial statements in criminal prosecutions, *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), a probation violation hearing is a post-conviction proceeding. *Breeding*, 284 Mich App at 482. Therefore, “the Sixth Amendment right to confrontation, as defined and applied in *Crawford*, does not apply to probation revocation proceedings.” *Id.* As explained in *Breeding*, however, the minimum requirements of due process include a limited right to confront and cross-examine adverse witnesses at parole and probation revocation hearings. *Id.* at 484-485.

In *Breeding*, 284 Mich App at 485, this Court observed that other courts have applied “two principal methods for establishing whether evidence has been admitted at a probation revocation hearing in violation of the limited due process right to confrontation and cross-examination.” One is “a balancing test that weighs the probationer’s interest in confronting a witness against the interests of the State in not producing the witness.” *Id.* (citation and internal quotation marks omitted). The second test requires the trial court to “determine[] whether the evidence reaches a certain level of reliability, or if it has a substantial guarantee of trustworthiness.” *Id.* (citation and internal quotation marks omitted). In *Breeding*, the Court declined to adopt either of these tests for establishing the admissibility of hearsay testimony at a probation revocation hearing because the defendant did not object to any of the alleged hearsay testimony or request that the declarants be produced for cross-examination. *Id.* at 487. Therefore, “the trial court was not obligated to engage in either a balancing test or a substantial trustworthiness inquiry to determine the admissibility of hearsay testimony.” *Id.* The same circumstances existed here relative to the procedural posture of the case.

In the present case, our Supreme Court’s order requires us to consider defendant’s issues, “including the due process issue left open by . . . *Breeding*[.]” *Clark*, 773 NW2d 669 (2009). Because the issue is unpreserved, however, we must consider it within the framework of the plain-error test set forth in *Carines*.

Considering the due process issue as mandated by the remand order, we conclude that, assuming a violation of due process under either of the two tests enunciated in *Breeding*, defendant's substantial rights were not affected, as he was not prejudiced. And defendant was not actually innocent of violating his probation, nor was the integrity of the proceedings compromised.

At the probation violation hearing, the trial court concluded that defendant had “clearly violated his probation,” although the court did not specifically articulate the manner in which defendant's probation was violated. However, at the sentencing hearing, the trial court expressly indicated that defendant had violated his probation by using marijuana. Accordingly, our focus must be on defendant's use of marijuana relative to examining the issues raised on appeal. At the commencement of the probation violation hearing, the trial court noted that it had received and read numerous letters submitted to the court by defendant. These letters, contained in the lower

court record, reveal repeated admissions by defendant that he had smoked marijuana while on probation. At the conclusion of the hearing, the court again noted the presence of the letters in the file and their disturbing content and then immediately proceeded to rule that defendant had violated the terms of his probation. We also note that, at the sentencing hearing during colloquies with the court, defendant repeatedly conceded that he had smoked marijuana. Any limited right to confront and cross-examine adverse witnesses was not implicated nor violated as to these matters.

Furthermore, with respect to the one witness called by the prosecution at the probation violation hearing, while she did at times testify to defendant's marijuana use by reference to hearsay, she also testified as to her own observations and was of course subject to confrontation and cross-examination. The witness testified that, during a home visit, she noticed that defendant smelled of marijuana, and she questioned him about it, although he denied using the drug. The witness also testified that defendant tested positive for marijuana at the clinic where the witness personally worked, thereby at least suggesting personal knowledge and involvement that could have been attacked on cross-examination.¹ Accordingly, there was evidence indicating marijuana use that was not tainted by any violation of defendant's limited due process right to confrontation and cross-examination.

In sum, assuming a violation of due process under either of the two tests set forth in *Breeding*, the plain-error test of *Carines* was not satisfied given defendant's repeated admissions to having smoked marijuana and the properly-admitted testimony of the witness who was subject to confrontation and cross-examination.²

Defendant next argues that the testimony of the one witness should have been suppressed because she “presumably is a licensed professional counselor . . .” and, therefore, testimony concerning his communications to her was privileged under MCL 333.18117. Because defendant did not object to the challenged testimony on this basis, this issue is not preserved and our review is again limited to plain error affecting defendant’s substantial rights. *Carines*, 460 Mich at 763. There is no need to explore this issue in any great detail. Defendant contends that the witness's testimony was based in part on confidential communications because she referred to defendant’s suicidal ideations, substance abuse, and self-mutilation. However, even assuming the existence of a legally protected relationship and covered communications, defendant revealed that same information in the numerous letters that he sent to the trial court. Thus, the witness did not reveal any confidential information because defendant had already disclosed the information

¹ With respect to other drug tests that allegedly revealed marijuana use by defendant, we note that defendant makes no claim whatsoever that the tests were faulty, invalid, or inaccurate; defendant does not deny using marijuana.

² For these same reasons, even had defendant properly preserved the issue, any presumed error was harmless and harmless beyond a reasonable doubt. MCL 769.26; *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005) (harmless error analysis – beyond a reasonable doubt – is applicable to claims regarding constitutional confrontation errors); *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). This also holds true with respect to the next issue that we address.

to the court. And again, marijuana use is our only concern, and defendant's repeated admissions established that he smoked marijuana regardless of any confidential communications. Reversal is simply unwarranted.

Affirmed.

/s/ William B. Murphy

/s/ Kirsten Frank Kelly

/s/ Cynthia Diane Stephens